

1 good adaptive skills in other domains and many no  
2 longer have the level of impairment required for  
3 diagnosis of mental retardation."

4 A. I agree with that.

5 THE COURT: Excuse me. Where were  
6 you reading from?

7 MS. MULLEN: The *DSM-IV*, which is the  
8 Diagnostic and Statistical Manual of Mental  
9 Disorders.

10 THE COURT: Thank you.

11 BY MS. MULLEN:

12 Q. And as you have discussed before, the  
13 adaptive functioning has to do with how a person  
14 deals in the outer world?

15 A. Yes.

16 Q. You're aware that Mr. O'Neal went to  
17 high school, are you not?

18 A. I am aware of that.

19 Q. He went to Taft High School?

20 A. Yes.

21 Q. Are you aware that he wasn't in any  
22 special class?

23 A. He was recommended for special  
24 classes. If you look at his academic performance  
25 he should have been.

1 Q. But he was not, right?

2 A. He was not. That doesn't mean that  
3 he shouldn't have been.

4 Q. Are you aware that he, for example,  
5 he owned and drove an automobile?

6 A. Yes.

7 Q. Are you aware of that?

8 A. Well, I don't know that. I'm aware  
9 that he owned an automobile. I know that he drove  
10 an automobile, that he could drive.

11 Q. Are you aware that he was in the  
12 military?

13 A. Yes.

14 Q. That he was a lance corporal in the  
15 military?

16 A. I have not seen that particular  
17 discharge. I have only read it.

18 Q. In the reports?

19 A. In the reports.

20 Q. You're aware that he was married and  
21 raised a family?

22 A. He was married and tried to raise a  
23 family.

24 Q. Okay. Were you aware that he had  
25 custody of his children?

1 A. Yes.

2 Q. He sought and received custody of his  
3 children?

4 A. Yes.

5 Q. Were you aware that he worked for a  
6 living?

7 A. At times he did, yes.

8 Q. He was a valued employee?

9 A. At times he was.

10 Q. Do you know that his mother testified  
11 at his trial that he was a normal child?

12 A. In terms of what? Walking?

13 Q. She said he was a normal child, a  
14 child who was normal. Are you aware of that, sir?

15 A. I don't recall her particular  
16 statement at trial.

17 Q. As you said before, as far as we  
18 know, he's adjusted to prison life?

19 A. Yes.

20 Q. Are you aware that his intellectual  
21 functioning was evaluated in prison, and there was  
22 no deficit noted?

23 A. I have seen the statement. I have  
24 not seen the evidence that they talk about. I  
25 also saw statements that he is "a bit dull." I

1 have not seen any data.

2 Q. But it's in the report?

3 A. But how is that determined?

4 Q. I don't know, but apparently the  
5 prison system thought that he had no deficit. Are  
6 you aware of that?

7 A. I'm aware of that, but I don't know  
8 how that pertains to the issue of retardation.

9 Q. But aren't these all evidence of  
10 adaptive functioning?

11 A. How much adaptive functioning  
12 -- excuse me. I'm not sure that much adaptive  
13 functioning is required on death row.

14 Q. How about he went to the high school,  
15 isn't that an indication of adaptive functioning?

16 A. But he did extremely poor.

17 Q. How about he was in the military?

18 A. He went AWOL. He did not find an  
19 alternative solution to dealing with the  
20 situation.

21 Q. None of these things change your mind  
22 about his adaptive functioning?

23 A. I never said he could -- if you read  
24 my report, I said there were two areas in which he  
25 could not adapt, and there are eight in which he

1 could. Yes, he has areas which he capable of  
2 adapting.

3 Q. You're aware, I am sure, that Dr.  
4 Nelson found that Mr. O'Neal was not mentally  
5 retarded?

6 A. He claimed that he was not.

7 Q. Even after reviewing your report?

8 A. Yes.

9 Q. Of course Dr. Chiappone had the same  
10 opinion, correct?

11 A. Yes.

12 Q. Now, you talked about his lack of  
13 social adaptivity?

14 A. Adaptability.

15 Q. He has a personality disorder, does  
16 he not?

17 A. Which is?

18 Q. Antisocial personality disorder?

19 A. Based upon --

20 Q. Borderline personality disorder.

21 A. Based upon what?

22 Q. It's in the reports. I mean, I only  
23 know the reports, like you do.

24 A. Okay. He had an antisocial  
25 personality disorder because of his drug use and

1 his run-ins with the law. I do not recall any  
2 basis or seeing a basis for diagnosing a  
3 borderline personality.

4 Q. He has been diagnosed  
5 psychiatrically, correct, as having a borderline  
6 personality?

7 A. I am not aware.

8 Q. You're not aware of that, sir?

9 A. I'm not aware of who diagnosed that  
10 or what is the basis.

11 Q. But you're aware of that?

12 A. I know that Dr. Nelson said that he  
13 had a borderline -- mixed borderline -- mixed  
14 personality disorder, including borderline  
15 personality and antisocial disorder. I don't know  
16 where he got it.

17 Q. Well, also it's in the trial  
18 transcript I think, too, from the psychologist who  
19 testified.

20 A. Dr. Chiappone?

21 Q. I'm not sure. I don't remember. But  
22 anyway, here's the point that I'm getting to,  
23 wouldn't that account for his lack of social  
24 skills or lack of social adaptability?

25 A. I think that's a great point, but I

1 think just as reasonably the fact that you have an  
2 individual who has brain dysfunction, which  
3 results in low intellectual functioning, which  
4 results in compromised ability to adapt to certain  
5 types of situations is as reasonable an  
6 explanation, and as far as I'm concerned, I have  
7 demonstrated the brain dysfunction, okay, as a  
8 neuropsychologist, that can account for the level  
9 of functioning that the disorder in functioning  
10 that we saw, and you can attach that on top of it,  
11 if you will, but still the underlying cause of the  
12 mental retardation in the inability to adapt in  
13 the two areas that I talked about in my opinion  
14 are the result of his brain dysfunction.

15 Q. Well, are you taking into  
16 consideration the entire social aspect?

17 A. You can put that on top of it, if you  
18 want to, but I'm still saying that the issue that  
19 we have been talking about, which is, is he  
20 mentally retarded? And there are areas of failure  
21 to adapt which coincide with that mental  
22 retardation, and I have talked about that a number  
23 of times. Those are the two that I think that  
24 lead to my conclusion, plus the fact that this  
25 occurred before the age of 18, that he is mentally

1       retarded.

2               Q.       Well, I'm asking you to consider if  
3       someone has an antisocial personality, wouldn't  
4       that lead to the same problem, and isn't that a  
5       separate thing of mental retardation?

6               A.       Yes, and that would not necessarily  
7       lead to the same problem.

8               Q.       Isn't that the basis of why so many  
9       people are in prison, is that they have that  
10      antisocial personality? They can't get along with  
11      people. And isn't that what Mr. O'Neal manifests?

12              A.       Yes, and there are also -- I'm going  
13      to go back to my talking about the kind of test  
14      results that he demonstrated, which shows a man,  
15      which is his brain, which locks in, if you will,  
16      because of a disturbance in the way the brain  
17      functions and cannot conceptualize different ways  
18      of handling certain types of situations that even  
19      somebody who has a borderline personality, or who  
20      is an antisocial personality can, in fact, do. He  
21      gets locked into it. He become perseverant. He  
22      is going to do same thing over and over. He gets  
23      a thought in his head, and it's almost like  
24      obsessive compulsive disorder. Once he starts on  
25      a track and it's an emotionally charged track, he



1 is limited. That is what I believe -- I think --  
2 is the cause of the mental retardation.

3 MS. MULLEN: I don't think that I  
4 have anything else. Thank you.

5 THE COURT: Redirect?

6 MR. KRUMHOLTZ: I just have one  
7 question.

8 REDIRECT EXAMINATION

9 BY MR. KRUMHOLTZ:

10 Q. Dr. Tureen, Ms. Mullen asked you  
11 about Dr. O'Neal's report. Is there anything to  
12 indicate that -- I said "Dr. O'Neal -- Freudian  
13 slip.

14 A. Dr. Nelson.

15 Q. Is there anything in Dr. Nelson's  
16 report that indicates that Dr. Nelson examined Mr.  
17 O'Neal?

18 A. No. My understanding is Dr. Nelson  
19 based his conclusions upon the review of  
20 documentation.

21 MR. KRUMHOLTZ: I have nothing  
22 further.

23 Your Honor, we would offer for  
24 admission -- they are covered by the  
25 stipulation, the three exhibits that we

1 have presented with the doctor.

2 THE COURT: Any objection to the  
3 exhibits?

4 MS. MULLEN: No, Judge.

5 THE COURT: Doctor, you can step  
6 down.

7 (Witness excused.)

8 THE COURT: Does the defense have any  
9 further witnesses?

10 MR. KRUMHOLTZ: We do not, your  
11 Honor.

12 THE COURT: The State have any  
13 witnesses you want to call?

14 MS. MULLEN: No, your Honor. We  
15 would just offer the exhibits that we have  
16 marked. Shall I recite what they are.

17 THE COURT: You want to recite those?

18 MS. MULLEN: State's Exhibit 1 is Dr.  
19 Nelson's report.

20 State's Exhibit 2 is Dr. Nelson's CV.

21 State's Exhibit 3 is Mr. O'Neal's  
22 medical chart.

23 State's Exhibit Number 4 is Mr.  
24 O'Neal's mental health file.

25 State's Exhibit 5 is the Ohio Supreme

1 Court decision, *State of Ohio v. O'Neal*,  
2 that being, *87 Ohio St. 3d 402*. That's  
3 all.

4 THE COURT: Any objection to the  
5 State's exhibits?

6 MR. KRUMHOLTZ: No objection.

7 THE COURT: Okay. We'll admit the  
8 defense exhibits without objection and the  
9 State's Exhibits without objection.

10 (State's Exhibits 1, 2, 3, 4 and 5  
11 were admitted;

12 Defendant Exhibits 1, 2 and 3  
13 were admitted.)

14 THE COURT: Does the defense wish to  
15 offer argument, or are you going to submit  
16 some kind of brief? How do you want to  
17 proceed?

18 MR. KRUMHOLTZ: It's really the  
19 Court's preference. I am happy to argue a  
20 few minute, if you would prefer, or if you  
21 prefer briefing, we can do it in that  
22 fashion.

23 THE COURT: Does the State have a  
24 preference?

25 MR. CUMMINGS: We are prepared to

1 argue if the Court prefers.

2 THE COURT: Why don't we give brief  
3 arguments. I don't have the benefit of me  
4 having reviewed all of exhibits at this  
5 time, and so I'll certainly allow you, if  
6 you want, to submit some kind of a brief.

7 I would suggest the defense would  
8 file something, and the State would respond  
9 to it, and you would have the final word.

10 I'll allow you to give a short  
11 argument at this time. I am thinking it  
12 would be helpful for me to consider your  
13 briefs after I have read everything.

14 MR. KRUMHOLTZ: That's fine. We will  
15 take advantage of that offer from the  
16 Court.

17 Briefly, the template for this, as  
18 you know, is *Atkins versus Virginia*,  
19 decided in June of 2002.

20 One of exhibits that you have  
21 received in the case is *State versus*  
22 *O'Neal*, the decision regarding this  
23 particular case, but please, as you sift  
24 through that particular information and the  
25 case decision, look at the date, which

1 predates *Atkins versus Virginia*.

2 what does *Atkins* tell us? *Atkins*  
3 tells us that there is a certain measure  
4 which a trial judge in your position can  
5 make that will determine whether someone is  
6 or is not mentally retarded. If they are  
7 mentally retarded, the Eighth Amendment  
8 precludes their execution.

9 what does *Atkins* look at? If you  
10 will look, Daryl Renard Atkins had a full  
11 scale IQ of 59, and the Court mentions the  
12 term "full scale IQ".

13 Dr. Tureen today and in his report  
14 tells you the full scale IQ for James  
15 Derrick O'Neal is 67.

16 Look also at the case of the *State*  
17 *versus Lott*, which is Ohio's adaptation, if  
18 you will, of the *Atkins*' test, and the  
19 Ohio's determination from the Ohio Supreme  
20 Court as to how the state court will  
21 survive or enforce, if you will, *Atkins*.

22 what the Court said was that an IQ of  
23 over 70 is presumed to be not mentally  
24 retarded. They chose some line drawing.  
25 They chose a line in the sand. They said,

1 if the IQ is over 70, a person is not  
2 mentally retarded.

3 We have a full scale IQ taken in  
4 2004, the WAIS-III, the current "gold  
5 standard" test, that indicates that man has  
6 an IQ of 67.

7 And Ms. Mullen is absolutely correct.  
8 There are ranges, and the Court knows that.

9 Dr. Tureen emphasized, and very  
10 importantly, the consistency of testing  
11 done when Mr. O'Neal was in grade school,  
12 done by Dr. Chiappone and done now by Dr.  
13 Tureen. So you have that IQ.

14 The IQ itself is not conclusive on  
15 the issue of mental retardation. The other  
16 issues becomes important under the Atkins  
17 standard. Are there significant  
18 limitations in adaptive function?

19 As I recall, there are ten areas of  
20 adaptive functioning. One of those is  
21 functional academics. Dr. Tureen's report  
22 and testimony highlighted Mr. O'Neal has a  
23 significant limitation in his functional  
24 academics.

25 The second area of significant

1 limitation and adaptive functioning for  
2 this person is that the fact in social  
3 situations that emotionally he is rigid in  
4 his thinking to the point that he has no  
5 social alternative. That, according to Dr.  
6 Tureen was a significant limitation that  
7 puts him into the category of mentally  
8 retarded.

9 So we ask the Court in looking at the  
10 evidence to pinpoint those issues of  
11 functional academics and those issues of  
12 the social functioning because it requires  
13 in *Atkins* two or more of these areas, and  
14 it requires a significant detriment in  
15 intellectual ability. That's where the 67  
16 IQ comes into play.

17 Thank you.

18 MR. CUMMINGS: Your Honor, if I may,  
19 we have an exhibit that I would like to  
20 pull out here.

21 Your Honor, at this juncture, I think  
22 it's important to point out that the  
23 defense has the burden of proof by a  
24 preponderance of the evidence.

25 *State v. Lott* made that clear. It's

1 also clear a score of an IQ test of above  
2 70 is a rebuttable presumption that  
3 somebody is not mentally retarded.

4 Now, in this case, as has been  
5 discussed, there's been multiple IQ test  
6 given to Mr. O'Neal, and he scored a  
7 variety of different scores in the range of  
8 I think 64 to 71 or 72. And taking into  
9 account the standard deviations, I think  
10 you can see where he could be as high as  
11 76.

12 And the point of that is that the IQ  
13 tests themselves are not determinative in  
14 this case. In fact, that's the point that  
15 Dr. Nelson makes in his report, that the IQ  
16 test itself doesn't really make this  
17 Court's decision an easy one. It's a  
18 range, and it's a nondeterminative issue  
19 here.

20 So really to resolve this issue in  
21 Mr. O'Neal's case, I think it's necessary  
22 to look at the adaptive evidence of his  
23 life history. I think that's where it is  
24 clearly evident that he is not mentally  
25 retarded.



1           Why do we say that? For a variety of  
2 reasons. I think when you go over the  
3 exhibits and the trial records, that would  
4 become clear. We would like to highlight  
5 for you the ones we think are most  
6 important.

7           First of all, I believe on Page 18 of  
8 the Supreme Court's opinion on mental  
9 retardation was not an issue in the  
10 mitigation phase, yet the Court went out of  
11 it's way to note in it's decision that Mr.  
12 O'Neal is not mentally retarded.

13          Second, you have the report of Dr.  
14 Nelson, where he says Mr. O'Neal is not  
15 mentally retarded precisely because of his  
16 excellent adaptive behavior he has  
17 exhibited over his life.

18          We have the mitigation testimony of  
19 Dr. David Chiappone, which is in the fifth  
20 volume of the trial transcript. He said  
21 the IQ range is definitely in the  
22 borderline range because Mr. O'Neal  
23 functions at a much higher level than his  
24 IQ would indicate. He is not mentally  
25 retarded.

1                   Look at Mr. O'Neal's life history.  
2                   He served in the military. He served the  
3                   last two years or three years as a lance  
4                   corporal. He went AWOL to attend his  
5                   father's funeral, but that still indicates  
6                   a man who served his country for 36 months.  
7                   Attending your father's funeral is not an  
8                   indicator of mental retardation.

9                   This is a man who, once he got out of  
10                  prison, decided he was going to turn his  
11                  life around.

12                 He told his family that he was going  
13                 to seek and he did ultimately attain  
14                 custody of his children. He made a  
15                 conscious effort to find steady employment,  
16                 and he did so.

17                 Why is this important? Because one  
18                 of the adaptive behaviors you must look at  
19                 is, does he have the ability to self  
20                 direct? Does he have the ability to focus  
21                 and make decisions? He clearly does. He  
22                 turned his life around. That's in the  
23                 mitigation hearing. You will see that and  
24                 review that. That was so striking the Ohio  
25                 Supreme Court noted that as well in its

1 decision. This was man who had self  
2 direction enough to pull himself together  
3 and decide he was going to seek steady  
4 employment and get custody of his children,  
5 and he did so.

6 He did get the custody of his  
7 children. His employment history had hills  
8 and valleys, but it's important to note  
9 that his employer said he was a fabulous  
10 employee at the Kenwood Country Club, and  
11 he would hire him back in a minute. He had  
12 a fantastic work ethic.

13 And when it goes to his social  
14 adaptability, it's important to note what  
15 the employer said about him.

16 He actually acted as peacemaker in  
17 the kitchen, which is a volatile, stressful  
18 environment. Often the kitchen workers  
19 would have disputes, and he acted as  
20 peacemaker.

21 He actually had high level of social  
22 adaptability, and he exhibited them so well  
23 the employer said he would hire this man  
24 back in a minute. His good work ethic  
25 earned him employee of the month at

1 Aerotek, the last place he worked.

2 His Department of Corrections'  
3 records will be in the exhibits with this  
4 Court, and it is important to note that the  
5 Department of Corrections noted no mental  
6 deficit. This is not a close case. This  
7 is a man, when he chooses to do so, has  
8 tremendous ability to adapt, and for that  
9 reason Dr. Chiappone says he functions at  
10 much a higher level than his attained IQ.  
11 That's what Dr. Nelson felt as well.

12 That's why the State is confident  
13 after the Court reviews all the testimony  
14 and trial exhibits of this case and the  
15 reports that it will find the defense has  
16 not met their burden here by a  
17 preponderance of the evidence.

18 Thank you.

19 THE COURT: Okay. You will have an  
20 opportunity to brief this. I don't know  
21 that you need to say anything further at  
22 this time. I'll ask you to agree on a  
23 schedule to submit those briefs, and then I  
24 will try to give you a determination in a  
25 timely fashion.

1 Any reason why we shouldn't order the  
2 defendant returned to the institution at  
3 this time.

4 MR. KRUMHOLTZ: No reason, your  
5 Honor.

6 THE COURT: We will do that. We'll  
7 order that the Hamilton County Sheriff  
8 return the defendant to -- where has he  
9 been at?

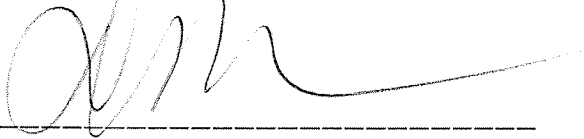
10 MR. GIDEON: Mansfield.

11 THE COURT: Mansfield. And I look  
12 forward to your briefs. Court will stand  
13 in recess.

CERTIFICATE

I, DEBORAH A. KAHLES, RPR, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the time and place stated herein, I recorded in stenotype and thereafter transcribed the within transcript of proceedings and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 19th day of May, 2005.



DEBORAH A. KAHLES, RPR  
Official Court Reporters  
Court of Common Pleas  
Hamilton County, Ohio



D66398089

**Court of Appeals First Appellate District of Ohio.**

STATE OF OHIO

Plaintiff APPELLEE

vs.

C 050840

No. B-939022

JAMES DERRICK O'NEAL

Defendant APPELLANT

TRANSCRIPT OF THE DOCKET AND JOURNAL ENTRIES

C-940652 1-125

C-960392 126-200

C-980247 201-221

C-040286 222-252

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GREGORY HARTMANN  
CLERK OF COURTS  
HAM. CNTY. OH

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# Court of Appeals First Appellate District of Ohio.

STATE OF OHIO

Plaintiff APPELLEE

C 050840

vs.

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JAMES DERRICK O'NEAL

Defendant APPELLANT

TRANSCRIPT OF THE DOCKET AND JOURNAL ENTRIES

2 of 2



TODAY'S DATE 12/12/2005

COMMON PLEAS DIVISION

PAGE 1

CASE B 9309022

Criminal Appearance Report

CMSR5155

## A P P E A R A N C E D O C K E T

Attorney - Plaintiff  
Attorney - Defendant JOHN JOSEPH GIDEON 8151  
Cur Judge - RALPH WINKLER 31

STATE OF OHIO vs JAMES DERRICK ONEAL

Total Deposits \$ 00  
Total Costs \$238 90

STATE OF OHIO  
vs  
JAMES DERRICK ONEAL  
UNKNOWN  
CINC

Municipal # , , ,

OH

Race B Age 39 Sex M

Filed 12/16/1993 0005 - WARRANT ON INDICTMENT

Count 1	Disposition 3DOC DEPARTMENT OF CORRECTIONS	Date 12/11/1995
Count 2	Disposition 3DOC DEPARTMENT OF CORRECTIONS	Date 12/11/1995
Count 3	Disposition 3DOC DEPARTMENT OF CORRECTIONS	Date 12/11/1995
Count 4	Disposition 3DOC DEPARTMENT OF CORRECTIONS	Date 12/11/1995

IMAGE	DATE	DESCRIPTION	AMOUNT
	12/16/1993	INDICTMENT REPORTED AND FILED INDICTMENT FOR AGGRAVATED MURDER 2903 01 R C (CAPITAL) W/SPEC, ATTEMPT (AGGRAVATED MURDER) 2923 02 R C W/SPEC, AGGRAVATED BURGLARY 2911 11 R C W/SPEC	
	12/16/1993	PRECIPE FOR WARRANT FILED AND WARRANT ISSUED	
68	12/20/1993	ENTRY APPOINTING COUNSEL DALE SCHMIDT	
	12/21/1993	SIMON L LEIS JR , SHERIFF I HAVE IN CUSTODY AND HAVE SERVED COPY OF INDICTMENT ON	
9	12/22/1993	SAID DEFENDANT BY PAUL COSGROVE DEPUTY PLEA OF NOT GUILTY ENTERED AT ARRAIGNMENT	
9	12/22/1993	\$1,000,000 COUNSEL ASSIGNED	
14	12/22/1993	DALE SCHMIDT & JOHN KELLER APPOINTMENT OF TRIAL COUNSEL IN A CAPITAL CASE DALE G SCHMIDT & JOHN T KELLER	
113	12/22/1993	APPLIC REQUESTING PERMISSION TO BROADCAST,TELEWISE,PHOTO , RECORD COURTROOM PROCEEDINGS CINTI ENQUIRER	
114	12/22/1993	APPLIC REQUESTING PERMISSION TO BROADCAST,TELEWISE,PHOTO , RECORD COURTROOM PROCEEDINGS CINTI POST	
236	12/22/1993	ENTRY OF CONTINUANCE 1/7/94	
	12/27/1993	NOTICE TO SUPREME COURT OF OHIO OF FILING OF INDICTMENT CHARGING AGGRAVATED MURDER W/SPEC (S) OF AGGRAVATING CIRCUMSTANCES 2929 021A R C	
	12/28/1993	DEMAND FOR DISCOVERY	
	12/28/1993	REQUEST FOR BILL OF PARTICULARS	
165	1/07/1994	ENTRY OF CONTINUANCE 1/14/94	
	1/10/1994	MOTION TO EMPLOY EXPERTS AND AUTHORIZE PAYMENTS OF FEES OF SAME	